

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

SHAWN KEVIN SMAAGE,

Petitioner,

vs.

JIM SALMONSEN; ATTORNEY
GENERAL OF THE STATE OF
MONTANA,

Respondents.

Cause No. CV 22-78-H-SEH

ORDER

Petitioner Shawn Smaage, a state prisoner proceeding *pro se*, applied for a writ of habeas corpus under 28 U.S.C. § 2254 on March 16, 2022,¹ challenging custody ordered on February 2, 2015.² The Court ordered him to show cause why the petition is not time-barred.³

Smaage asserts he believed his attorney had appealed from the 2015 judgment.⁴ However, by no later than September 21, 2017, he knew no appeal had been filed.⁵ He claims that before September, 2017, he was “deeply engrossed in

¹ Doc. 1 at 16.

² Doc. 1-1 at 1–3 (Judgment, No. CDC 2014-28 (Mont. First Jud. Dist. Ct. Feb. 2, 2015)).

³ Doc. 4.

⁴ Doc. 1-1 at 4.

⁵ Doc. 4 at 5; Doc. 6 at 1–27; *see also Smaage v. State*, 2017 MT 221N (Mont. Sept. 5, 2017); Pet. for Reh’g, *Smaage*, No. DA 16-0750 (Mont. Sept. 21, 2017) (addressing Sept. 5

rectifying” a judgment entered in separate case in 2000, obtaining resentencing in July 2015, and continuing his challenges thereafter.⁶ The 2000 case was not “connected”⁷ to the criminal judgment underlying the federal petition, filed March 16, 2022.⁸

Four transfers of custody location in eight years⁹ did not prevent Smaage from filing a motion to withdraw his guilty plea in the trial court on December 3, 2015, a petition for postconviction relief on August 16, 2016, or briefs and petitions in the Montana Supreme Court in 2016, 2019, and 2021.¹⁰ A person of reasonable diligence would have filed a federal habeas petition long before March 16, 2022.

Smaage does not adequately justify equitable tolling or any other excuse for

ruling). The Court takes judicial notice of this and other documents related to Smaage’s Lewis and Clark County conviction. *See* Fed. R. Evid. 201(b); *Trigueros v. Adams*, 658 F.3d 983, 987 (9th Cir. 2011).

⁶ Doc. 6 at 22–23.

⁷ Doc. 6 at 18.

⁸ *See, e.g., Smaage v. Fender*, No. OP 16-0241 (Mont. May 10, 2016) (addressing Smaage’s July 2015 resentencing and sentence imposed in No. CDC 2014-28); *see also* Doc. 101 at 2–3 (noting that Smaage “committed ten (10) prior drunk driving-related offenses, including eight (8) DUI’s, one (1) negligent homicide, and one (1) criminal endangerment” before conviction in CDC 2014-28). Three DUI-related convictions make fourth and subsequent DUI convictions felonies, each of which may subject the offender to enhanced punishment as a persistent felony offender. *See* Mont. Code Ann. § 61-8-731 (2013) (now codified at § 61-8-1008); Mont. Code Ann. §§ 46-18-501, -502 (2013) (now codified at §§ 46-1-202 and -18-502); *State v. Yorek*, 2002 MT 74 ¶¶ 17–20, *overruled on other grounds by DeShields v. State*, 2006 MT 58 ¶ 9.

⁹ Doc. 6 at 15–16.

¹⁰ *See Smaage v. State*, 2017 MT 221N ¶¶ 2–3; *see also Smaage v. Fender*, No. OP (Mont. Apr. 21, 2016); *Smaage v. Guyer*, No. OP 19-0292 (Mont. May 20, 2019); *Smaage v. State*, No. DA 21-0607 (Mont. Dec. 21, 2021).

his untimely filing.¹¹

A certificate of appealability is denied.¹²

ORDERED:

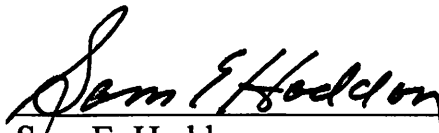
1. The motion for extension of time¹³ is **DENIED AS MOOT**.

2. The petition¹⁴ is **DISMISSED WITH PREJUDICE**.

3. The clerk shall enter judgment by separate document in favor of Respondent and against Petitioner.

4. A certificate of appealability is **DENIED**.

DATED this 21st day of October, 2022.



Sam E. Haddon
United States District Court

¹¹ Doc. 4 at 5; 28 U.S.C. § 2244(d)(1)(B), (C); *Holland v. Florida*, 560 U.S. 631, 649 (2010); *see also McQuiggin v. Perkins*, 569 U.S. 383, 387 (2013)); Opening Br. at 2–4, *Smaage*, No. 16-0750 (Mont. Mar. 27, 2017).

¹² 28 U.S.C. § 2253(c)(2); Rule 11, Rules Governing § 2254 Cases; *Gonzalez v. Thaler*, 565 U.S. 134, 140–41 (2012) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

¹³ Doc. 5; *see also* Doc. 6-1 at 1–2.

¹⁴ Doc. 1.